

1 under a land contract defaults under the terms of
2 the contract and they haven't made payments for five
3 years, or they haven't paid 20 percent of the purchase
4 price, their equitable interest is subject to
5 forfeiture.

6 A. Can you --

7 Q. Is that the law or not?

8 A. I earlier agreed with you that the
9 statute said that, but I amplified that answer to
10 suggest to you that under the circumstances of this
11 case, that I was doubtful that a court would permit
12 forfeiture. There's a maximum law that says equity
13 abhors a forfeiture, and I really think the courts
14 are very -- bend over backwards to preclude under
15 circumstances such as this -- and by that I mean
16 substantial equity in the property. Even though
17 the purchase price is described as \$37,000 --

18 Q. Right.

19 A. -- and 20 percent of that number has
20 not been paid to the vendor.

21 Q. Right.

22 A. Under the circumstances in this case,
23 I do not think that a court would have permitted a
24 summary forfeiture of the equity.

1 Q. All right. And --

2 A. Let me describe to you; even before
3 the statute --

4 Q. Can we -- I don't want to --
5 I mean --

6 A. It's germane to this issue.

7 Q. Are we talking about history now
8 before the statute?

9 A. No, we're talking about law.

10 Q. Well, I want to talk about the law
11 that's in effect now, okay?

12 A. And I'm telling you that my view --
13 a summary procedure would not have been obtained in
14 this circumstance.

15 Q. That would have been up to a judge or
16 jury, right?

17 A. Judge.

18 Q. A judge?

19 A. (Nods head.)

20 Q. And are you saying that a default
21 action -- breach of the land contract would have been
22 an equitable proceeding?

23 A. No. I'm saying that a municipal
24 court judge, sitting in a forcible entry and detainer

1 procedure as in this case, a statutory procedure would
2 not have caused there to be a forfeiture, and beyond
3 that, according to what Mr. Blessing has told me, in
4 this case the judge when told that there was a land
5 -- erroneously apparently told that there was a land
6 contract says much; said that he wouldn't -- but the
7 problem was that the Curtises couldn't produce an
8 executed land contract.

9 This judge, according to my understanding,
10 would not have granted the forcible entry and detainer
11 if there had been a signed contract.

12 Q. Now, who told you that?

13 A. Mr. Blessing.

14 Q. And did Mr. Blessing make you aware
15 that there was testimony presented in the municipal
16 court?

17 A. My understanding is that the Curtises
18 said they had a land contract, and it turned out that
19 they were talking about this unsigned document; that
20 the Curtises thought they had a viable land contract,
21 but they only had this unsigned document.

22 Had they, according to my understanding,
23 had a signed land contract, the forcible entry and
24 detainer writ would not -- the writ of possession --

1 writ of restitution would not have been granted.

2 Q. And did Mr. Blessing tell you that
3 that's what the judge said to the Curtises?

4 A. That was my understanding.

5 Q. Did Mr. Blessing tell you that?

6 A. I believe he did.

7 Q. And he told you that the judge said,
8 "well, if you had a signed land contract, I wouldn't
9 be ordering this eviction"?

10 A. Well, I think you've asked me that
11 three times now, and I think my answer's always been
12 yes. And that would have been the result, as I said
13 earlier, that I would have predicted, anyway.

14 Q. Right. And so you're predicting
15 what, in your opinion, a judge would have done had
16 the issue come before him in the Hamilton County --
17 or her -- in the Hamilton County Municipal Court?

18 A. Had there been a signed land
19 contract, I think the judge would not have granted a
20 writ of restitution.

21 Q. Okay. And you're basing that, if I
22 understand, on the discrepancy -- are we back to this
23 equity issue again, that the Curtises had so much
24 equity in the property that it just would have been

1 not equitable to forfeit their equitable interest?

2 A. That's correct.

3 Q. Okay.

4 A. On the same -- basically, on the
5 statutory theory, you see, the statute presupposes
6 -- and I can speak with certainty to this, 'cause I
7 drafted it -- but the statute presupposes that the
8 purchase price reflects all or virtually all --
9 the land contract balance at inception is all, or
10 substantially all of the purchase price; therefore --

11 Q. Right.

12 A. -- ergo, there's no equity until
13 20 percent has been paid in, or in five years, enough
14 payments have been made, but in this case if the value
15 is even \$50,000, then there is more than 20 percent
16 equity, and the theory of the statute is that if
17 there is substantial -- in a 20 percent equity in
18 the property, then there's no separate proceeding.
19 Now, that's not to say that you can't have a
20 non-summary proceeding.

21 Q. At the time that Mr. Curtis stopped
22 making his payments to Mr. Bigelow, have you
23 calculated how much equity he had in the property,
24 in your opinion?

1 A. Based -- in a casual way, yes.

2 Q. Have you calculated the amount of
3 equity that Curtis had in the property, at that time?

4 A. In a casual way, yes.

5 Q. Okay. Well, what's your casual way?

6 A. Well, I've told you, maybe 20 times
7 in this discussion, that my information and consistent
8 with my knowledge is, is that the property was worth
9 two to three times the land contract price, and I
10 knew about the taxes, which are extinguished on the
11 closing, so he had a substantial equity in there.

12 Q. How much?

13 A. Well, you asked me that earlier, and
14 I told you it was the difference between whatever the
15 value was, I presupposed 90,000 at one point --

16 Q. All right.

17 A. -- because there was a subsequent
18 sale for 95,000, but based on that, it's the
19 difference between 90,000 and 37,000, and there would
20 be a little interest on top due, but I've already
21 knocked 5,000 off the top.

22 Q. All right. So, in your opinion, the
23 amount of equity that Curtis had in the property at
24 the time he stopped making the payments was 90,000,

1 less the 37?

2 A. Plus interest that was due -- that
3 would have been due at 11 percent from the due date of
4 the first missed installment.

5 Q. You need to help me with that last
6 part.

7 A. It's non-material. It doesn't change
8 very much, but I'm glad to share it with you, if you'd
9 like.

10 Q. Well, I'm asking you to, yeah.

11 A. All right. Curtis would have owed --
12 the payoff would not have been \$37,000. It would have
13 been \$37,000 plus --

14 Q. Right.

15 A. -- the interest for the period of
16 time that he didn't pay, and I don't recall offhand,
17 but he probably should have gotten credit for the
18 principal component of the monthly payments, if any,
19 and minus that number. Those numbers are not going to
20 be substantial --

21 Q. Okay.

22 A. -- but you would add, you know --
23 to his burden you would add the interest, and subtract
24 the principal component.

1 Q. All right. And the major numbers
2 here are the \$90,000 --

3 A. Or 95,000, based on the --

4 Q. -- 90 to 95,000 --

5 A. -- Yeah.

6 Q. -- less the 37,000?

7 A. And your question was, did I
8 calculate it, and yes, I did, and my calculation
9 wasn't based on 90,000. It was based on 75 to a
10 hundred thousand, and I didn't -- I told you I did
11 it casually, I didn't do it precisely, but what I
12 concluded was, that there was -- you know, that the
13 equity in the land contract far exceeded the balance
14 of the purchase price.

15 Q. All right, based on your assumptions
16 again about fair market value --

17 A. Correct.

18 Q. -- and the information that was given
19 to you by Mr. Blessing?

20 A. Well, no, partly based on the
21 information. The rest of the information was my
22 personal knowledge of the neighborhood.

23 Q. Right, and we've already talked about
24 that.

1 A. Right.

2 Q. But homes and neighborhoods, we can
3 agree, can vary greatly in fair market value, right?

4 A. Wouldn't be anything in that
5 neighborhood worth less than \$50,000.

6 Q. Really?

7 A. I don't think so. And, like I told
8 you earlier, I'm not an expert on real estate
9 valuation.

10 Q. If property's not maintained, that
11 can decrease the fair market value, can't it?

12 A. Absolutely, but I don't think it
13 would take it below that number.

14 Q. Okay. And you don't have any
15 information at all about how Curtis maintained this
16 property, do you?

17 A. You're absolutely right.

18 Q. All right.

19 A. You know, I have some other
20 information, though. I know that not long after
21 the closing, according to the information that
22 Mr. Blessing supplied me, that it was mortgaged for,
23 if I recall, 65,000. Am I correct in that?

24 Q. Well, keep going. Tell me what your

1 information is.

2 A. Well, I would have to look at my
3 notes, but it was mortgaged for a number larger than
4 \$50,000. And according to my information, only \$3,000
5 was spent to fix it up; namely, the roof and the
6 porch. And based on my experience, I don't think
7 institutional lenders would have loaned 65,000 or
8 anything like that if the property weren't worth at
9 least that much, or, more likely, a little more,
10 like, 75 or \$80,000. So, that's all consistent with
11 my conclusion.

12 Q. Do you know who did the work on --
13 who put the roof on?

14 A. No.

15 Q. And what's your understanding of how
16 much it cost to put that roof on?

17 A. Again, the third time, \$3,000 --

18 Q. All right.

19 A. -- for the roof and the porch.

20 It strikes me very low.

21 Q. You're aware, aren't you, that there
22 was a fire at the property on February 9th of 2000?

23 A. Mr. Blessing told me there was a
24 fire. I don't think he told me when.

1 Q. okay. Well, I'm telling you -- I'll
2 represent to you that it was February 9th, and the
3 fire was set by Mr. Curtis. I represent that to you.

4 A. All right.

5 Q. Do you have an opinion as to what the
6 fair market value of the property was after that fire
7 was extinguished?

8 A. Well, it probably would be very
9 little, but I understand that there was fire
10 insurance. So the owner of the property would be
11 entitled to the proceeds -- not only to the residue
12 of the property, but the proceeds of the insurance.

13 Q. okay. Well, that's a separate issue,
14 the insurance. I'm talking to you about the fair
15 market value of the property now.

16 A. And I just got done saying that it
17 would not be very much, but I don't know how much.

18 Q. okay, well, you didn't say that
19 before. You didn't know how much. That's what I was
20 asking you.

21 MR. BLESSING: Hey; you don't have to
22 tell him what he said. Just go ahead and ask him
23 questions.

24 MR. LEWIS: Well, he's telling me he

1 already said it, and --

2 MR. BLESSING: And she can read it back,
3 you know?

4 BY MR. LEWIS:

5 Q. And you're aware that there was a
6 renovation of the property after the fire?

7 A. I was told that.

8 Q. okay. And do you have an opinion
9 as to what the fair market value of the property was
10 after the renovation?

11 A. No.

12 Q. Do you believe the renovation
13 increased the fair market value of the property?

14 A. From where it was immediately before
15 the renovation?

16 Q. Uh-huh.

17 A. I was told -- I was told that about
18 \$30,000 was spent on the renovation, and I assume that
19 that would have increased its value.

20 Q. All right. Do you have an opinion as
21 to how much the property appreciated in value as a
22 result of the renovation?

23 A. No.

24 Q. Have you calculated the net profit

1 that Mr. Bigelow made on this transaction, in your
2 opinion?

3 A. Yes.

4 Q. How much?

5 A. My memory is \$109,000.

6 Q. Okay. Can you explain to me how you
7 calculated that?

8 A. Based on information supplied to me
9 and on the records that I was furnished, Mr. Bigelow
10 paid the following sums -- and I'm reading from a memo
11 in this --

12 Q. The binder, right.

13 A. -- binder, Exhibit D, and it's dated
14 January 19 of '04 --

15 Q. Right.

16 A. -- all right? It starts out with
17 Bill Blessing, but that's in reference to when
18 the trial is to occur, and Mr. Blessing did not
19 participate in these calculations.

20 Q. These are your notes?

21 A. Yeah; other than I've already --
22 in fact, I don't think I even shared these with
23 Mr. Blessing.

24 According to what I observed -- and

1 these are round numbers -- Bigelow paid \$15,000
2 to the property, and I got that information from
3 the settlement statement. He paid 9500 and
4 4500-something, so roughly about \$15,000. According
5 to the information supplied by Mr. Blessing, he spent
6 \$3,000 in October of '99 for the roof and the porch,
7 and subsequent of that -- but I don't have the date,
8 you just supplied one -- he spent \$33,000 of the
9 insurance proceeds to renovate it.

10 Q. All right. And Mr. Blessing told you
11 that?

12 A. Yeah.

13 Q. Okay.

14 A. And that's a total of \$51,000.

15 Q. Okay.

16 A. He received when he sold the
17 property, according to the information Mr. Blessing
18 supplied me in the year 2000 or '01, \$95,000.
19 He received from fire insurance proceeds \$65,000.
20 That's a total of \$160,000. I subtracted the 51,000
21 from \$160,000, resulting in \$109,000, and then I
22 learned from Mr. Blessing that he gave Roseanne
23 Christian, his colleague, \$3500 -- and I don't
24 know when -- which reduced the 109,000 to 105,5.

1 So according to my information, I concluded and
2 calculated that Mr. Blessing (sic) made a little
3 over \$100,000 on the deal.

4 Q. And you understand, don't you, that
5 the reason he got that \$65,000 that you have in the
6 income category is because Mr. Curtis set the fire?
7 Is that your understanding?

8 A. I understand there was a fire, and I
9 understand there was fire insurance, and I understand
10 that as a result of fire insurance, he received fire
11 insurance proceeds of \$65,000.

12 Q. All right. Now, are you factoring
13 in -- Bigelow refinanced -- when he bought the
14 property from Curtis, he took out a mortgage, right?

15 A. It would net out when he sold it.

16 Q. He what?

17 A. I said it would net out when he sold
18 it.

19 Q. What do you mean it would net out
20 when he sold it?

21 A. If he -- I don't know those facts,
22 but hypothetically, if he refinanced it -- well, he
23 didn't refinance it -- if he financed it for \$65,000
24 shortly after he acquired title from Curtis --

1 Q. Right.

2 A. -- he would have received the bulk
3 of the \$65,000. when he sold the property sometime
4 later, he would have received that much less out of
5 the sale proceeds because there was a mortgage, so the
6 net would be zero. The net -- the refinancing would
7 not alter the numbers, the numbers that I just gave
8 you. He got -- he would have just gotten the 65,000
9 in my hypothetical earlier, rather than later. If he
10 just disregards that mortgage, he gets the same amount
11 of money. It's just a timing difference.

12 Q. Did Bigelow have to pay a mortgage --
13 at the time that he sold the property after the fire,
14 did he have to pay a mortgage lender?

15 A. I'm sure he did, if he had a
16 mortgage.

17 Q. All right.

18 A. But if he had a mortgage, he got the
19 mortgage proceeds earlier.

20 Q. All right.

21 A. So, it's a net zero.

22 THE WITNESS: And let the record show
23 that Counsel's nodding in agreement.

24 MR. LEWIS: I'm nodding, 'cause I'm trying

1 to understand.

2 THE WITNESS: Fair enough.

3 BY MR. LEWIS:

4 Q. So you're saying it's a zero-out
5 transaction, that aspect, because when he financed it
6 initially, he would have gotten that money, right?

7 A. He would have just -- correct.

8 He would have just anticipated that much of the
9 purchase price.

10 Q. All right.

11 A. It's just a timing difference.
12 He got it earlier.

13 Q. And then paid it back later?

14 A. Right. And it's not an exact
15 indubitable equivalent, but it's close.

16 Q. A what?

17 A. Indubitable equivalent. That's a
18 word of art.

19 Q. Okay. Can I look at that?

20 A. Sure. (Hands notebook to Mr. Lewis.)
21 If you're having any trouble reading that, just let
22 me know. I didn't make those records for you; I made
23 them for myself.

24 Q. I understand. (Confers with

1 Mr. Bigelow.) Now, Mr. Lerner, the sales price you
2 have on this, 95,200. Do you see that?

3 A. Yeah, I do.

4 Q. That was the sales price to the
5 Cures. That's the buyer's name, the Cures, okay?

6 A. Okay.

7 Q. You're assuming that Bigelow got all
8 that money, aren't you?

9 A. Yes.

10 Q. And if he would have taken a second
11 mortgage?

12 A. Wouldn't have mattered; for the same
13 reason, the first didn't matter. He would have gotten
14 -- just anticipated part of the price earlier -- oh,
15 if he had taken it back?

16 Q. Right.

17 A. Well, if he had taken it back, it's
18 something of value. You still had -- it doesn't
19 matter.

20 Q. Okay.

21 A. He still has -- instead of cash,
22 you've got a piece of paper, but it has the same
23 value.

24 Q. Okay. So let's assume he's got a

1 piece of paper and hasn't collected on it, okay?

2 A. That's still something of value, and
3 you pay taxes on it, anyway.

4 Q. All right. But this 95,2 assumes
5 that --

6 A. It assumes that that's the purchase
7 price. That's all it assumes.

8 Q. Right, right, right.

9 A. And it doesn't matter if he took it
10 in bananas, or cash, or a mortgage.

11 Q. And if the Cures haven't paid him,
12 and --

13 A. It doesn't matter. It still --
14 it doesn't matter. You can elect an installment of
15 treatment under certain circumstances, but they're
16 probably not present here.

17 Q. All right.

18 A. They're not present here, unless
19 it was a huge mortgage.

20 Q. So you're saying if he's got a
21 promissory note and a mortgage from the Cures, it's
22 worth just as much as cash in hand? Is that what
23 you're saying?

24 A. Substantially, yeah.

1 Q. And the 65 here that you've got
2 written, "insurance" -- is that what this is in
3 Bigelow's column?

4 A. Correct.

5 Q. 160,000, and then --

6 A. 161; isn't it? Well --

7 Q. And then you're taking off --

8 A. -- I rounded it -- actually, I think
9 that's 95, not 95,2 -- but I can't read it, either.

10 Q. All right. And then you're taking
11 the 51 off that you've -- well, that you originally
12 calculated were his costs, right --

13 A. Right, right.

14 Q. -- to 109, less what he paid
15 Ms. Christian, so you're saying that he netted
16 \$105,500 on this property?

17 A. That's what I said.

18 Q. okay. Now, have we discussed all the
19 opinions that you've formed in this case?

20 A. I thought we had a long time ago.

21 Q. we haven't talked about this.

22 A. Well, you asked me if I did a
23 calculation, and I told you, yes.

24 Q. okay. Have you discussed all the

1 | opinions that you've formed in this case?

2 A. Well, as I said before, I thought we
3 had a long time ago, and if you ask me questions, I'll
4 be glad to share my opinions with you.

5 Q. Do you have any other opinions, other
6 than what we've talked about?

7 A. None that currently occur to me.

8 Q. If any occur to you later, will you
9 let Mr. Blessing know --

10 A. Sure.

Q. -- so that he'll let me know?

12 A. Sure.

13 | Q. Okay.

14 MR. LEWIS: Give me a minute. I think I'm
15 finished.

16 | (off-the-record discussion.)

17 MR. LEWIS: Mr. Lerner, just a couple more
18 questions.

19 BY MR. LEWIS:

20 Q. At the closing when Mr. Bigelow sold
21 the property to the Cures, he would have had seller's
22 expenses incident to that closing, right?

23 A. of course.

Q. And have you taken that into

1 consideration in calculating the amount of money
2 that Mr. Bigelow netted on this transaction?

3 A. Yes, in the sense that my purpose
4 in doing this was to come to an approximate number
5 -- it wasn't an exact science.

6 Q. Right.

7 A. I understand that the purchase price
8 was a little higher than the 95,000 I use, and I'm
9 not, you know, he may have had more than a couple
10 thousand dollars of expenses, but it wouldn't have
11 materially changed the result.

12 Q. But the answer to my question is, no,
13 you haven't taken those expenses into consideration in
14 calculating Bigelow's net profit, correct?

15 A. That's not correct. I would have
16 assumed the result was a few thousand dollars off,
17 but because -- but I would have assumed all the
18 numbers had that much flexibility in them.

19 Q. All right. Well, do you know what
20 his expenses were incident to that transaction with
21 the Cures?

22 A. No. I just today learned that --
23 I assume it was -- because he's talking about land
24 contract -- that it was a private transaction as

1 distinguished from a buyer being financed with
2 an institutional mortgage, and his expenses probably
3 would have been lower.

4 Q. You thought the Cures had a land
5 contract with Bigelow?

6 A. No, had a mortgage back, but
7 apparently from what he just said a moment ago,
8 apparently he financed the buyers.

9 Q. He took a second mortgage.

10 A. Oh, I didn't know that. Okay. These
11 numbers would be off by his expenses, and that would
12 have amounted to several thousand dollars, but it
13 wouldn't materially changed the result.

14 Q. All right. So what do you mean by
15 several thousand dollars?

16 A. It could vary by as much as 4 or
17 5,000. More likely a couple thousand/2.

18 Q. So in terms of calculating net
19 profit --

20 A. It could be --

21 Q. -- we should subtract 2 to 5,000;
22 is that right?

23 A. Yeah, you could add a couple thousand
24 back in, because I've understated the purchase price

1 by that amount.

2 Q. Well, you'd need the exact numbers to
3 do an exact calculation --

4 A. I wasn't trying to do an exact
5 calculation.

6 Q. Oh.

7 A. I was trying to do something
8 approximate.

9 Q. But you'd need the numbers to do an
10 exact calculation?

11 A. That is correct.

12 Q. And you ballparked the purchase price
13 -- you approximated the purchase price? Is that what
14 you said?

15 A. I think Mr. Blessing had told me that
16 it was about 95,000. He just now, a moment ago, told
17 me it was 97-something.

18 Q. Okay.

19 MR. LEWIS: Thank you.

20 THE WITNESS: Thank you.

21 (Witness waived signature.)

22
23 (The deposition of DONALD M. LERNER, ESQ.,
24 was adjourned at 1:41 p.m.)

1 STATE OF OHIO) ss
2)

3 I, ANNA I. CROUCH, a Notary Public within
4 and for the State at Large, do hereby certify that
5 the foregoing deposition of:

6 DONALD M. LERNER, ESQ.

7 was taken before me at the time and place and for
8 the purpose in the caption stated; that the witness
9 was first duly sworn to tell the truth, the whole
10 truth and nothing but the truth; that the deposition
11 was reduced to stenotype writing by me in the presence
12 of the witness; that the foregoing is a full, true
13 and correct transcript so given; that there was
14 no request that the witness read and sign his
15 deposition; that the appearances were as stated in
16 the caption.

17

18 WITNESS MY SIGNATURE THIS 3rd DAY OF FEBRUARY, 2004.

19 My Commission Expires: October 17, 2004.

20
21 
Anna I. Crouch
Notary Public
State at Large, Ohio
22
23
24